92-1357

No._____

Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

ADRIAN MALDONADO NIEVES and JOSE' REYES,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondents,

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the application of a sentencing enhancement on the basis that it is reasonably foreseeable that a manager of a conspiracy knows of weapons possessed by other co-conspirators, without further nexus or a requirement of close proximity violated the due process clause of the constitution and the policy of Mistretta?

II. Whether the introduction of evidence membership of a prior california conspiracy and gang, constituted a constructive amendment of the Superseding Indictment of the Idaho conspiracy, and was more prejudicial than probative?

III. Whether the crime of Money Laundering as defined at 18 U.S.C. 1956 should include all expenditures of illegally gained proceeds regardless of the intent of the expenditure?

IV. Whether the Speedy Trial Act, 18 U.S.C. 3161 et seq. be used as administrative vehicle to subjugate the constitutional right to a speedy trial?

V. Should counsel for the Unites States be allowed to vouch for the credibility of the only co-conspirator who testified at trial?

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IN THE SUPREME COURT OF THE UNITED STATES

ADRIAN NIEVES MALDONADO and JOSE' REYES,

PETITIONERS,

-VS-

UNITED STATES OF AMERICA,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, ADRIAN MALDONADO and JOSE' REYES, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 16, 1992.

OPINION BELOW

On April 16, 1992, the Court of Appeals entered its Opinion sustaining the 22 year sentence imposed upon Petitioner Maldonado and a 30 year sentence on Petitioner Reyes, following their being found guilty by a jury in the Unites States District Court, District of Idaho by a twelve person jury of one count of Conspiracy to Deliver Cocaine, pursuant to 21 U.S.C. 846 and multiple counts of delivery or possession of cocaine, pursuant to 21 U.S.C. 841 and Money Laundering, 18 U.S.C. 1956. REYES was also found guilty of a Continuing Criminal

Enterprise, 21 U.S.C. 848. A copy of the opinion is attached as Appendix "A".

JURISDICTION

On April 16, 1992, the Court of Appeals entered its Opinion sustaining the 22 year sentence imposed upon petitioners, Maldonado and Reyes after their conviction to Conspiracy to Deliver cocaine, to Delivery or Possession or cocaine, and Money Laundering, as well as Continuing Criminal Enterprise for Reyes.

Jurisdiction of this Court is invoked under Title 28, U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V: "No person shall . . . be deprived of life, liberty, or property without due process of law; . . ."

United States Constitution, Amendment IV: "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . ."

STATEMENT OF THE CASE

Petitioner Maldonado moved from New York City to Los Angeles, California, in 1987, where he met Ana Reyes, his future common law wife, and her brother, Petitioner Jose' Reyes. Reyes and other defendants in the case were members of the Thirty-eighth Street Gang in Los Angeles, but Maldonado was never shown to be a member of the gang. His main association with the gang, and Reyes was as a family member, and was coincidentally also a cousin of Maldonado's. Maldonado and his wife moved to Idaho in the spring of 1989. He had limited association with other hispanic co-defendants in the case once in Idaho, but was not close to them, in part because he had never been a gang member. Their co-defendants, including Reyes, had also moved to Idaho later in 1989

and had begun a cocaine distribution operation there. Surveillance and infiltration by undercover agents into the cocaine operations of Jose' Reyes in Idaho also focused on Maldonado because of his family association with Reyes. No purchases of narcotics were over made from Maldonado during the investigation through 1989, but he was occasionally in the vicinity of or with others who did sell to undercover agents.

Petitioners also made purchases of necessary household goods and services, including automobiles, houses, and an apartment building, generally by making down payments with cash. No effort was ever made to conceal or disguise the transactions, even though much of the United States' case focused upon their purported affluent life style.

The Superseding Indictment in this case alleged that the defendants conspired between January 1989 and January 8, 1990 to distribute or possess cocaine with the intent to distribute. Yet much of the evidence produced by the Government related to cocaine or heroin trafficking prior to 1989. The Petitioners were arrested on January 8, 1990, and were held in custody despite motions for release from detention through trial, which concluded July 26, 1990.

One of the Government's most important witnesses, was Mr. Jose' Valladares. Mr. Valladares testified at length about his involvement in the Thirty-eighth Street Gang, his association with Jose' Reyes and other co-conspirators, about the sale of cocaine and the quantity and regularity of the flow of cocaine by Jose' Reyes and his accomplices to the Pocatello, Idaho, area. He had a great deal to gain by his testimony, and his credibility was a central issue in the case.

In the heat of closing arguments, the prosecutor addressed Mr. Valladares' history, and then states:

> Jose Valladares, I would suggest to you, is a credible witness. He has admitted his own guilt and he also has told you the truth about what he knows. (tr. p. 2420-2421)

After jury trial, Maldonado was found guilty on all counts charged except one. He was found guilty of one count of Conspiracy to Deliver Cocaine (21 U.S.C. 841) and Money Laundering (18 U.S.C. 1956). Reyes was found guilty of those charges and Continuing Criminal Enterprise, 21 U.S.C. 848. Reyes was sentenced to 360 Months, and Maldonado was sentenced to 240 months, based in part upon the application of the United States Sentencing Guidelines, U.S.S.G. 1B1. 3 (a)(1), giving his a two-level enhancement for Possession of a Firearm. He had never been found in possession of a firearm, nor was there any evidence that he knew others used or possessed firearms. The firing of a firearm by another co-defendant at one point in time was not related to any of the conduct or charges concerning delivery of cocaine.

Petitioners filed an appeal on these and other issues to the Ninth Circuit Court of Appeals. On April 16, 1992, the Court of Appeals affirmed Petitioners' sentences but remanded the matter to the District Court so it could append a transcript of its sentencing proceedings to the presentence investigation report in Maldonado's case.

REASONS FOR GRANTING THE WRIT

I. The Application of a Sentencing Enhancement on the Basis that it is Reasonably Foreseeable that a Manager of a Conspiracy Knows of Weapons Possessed by Other Co-Conspirators, Without Further Nexus or a Requirement of Close Proximity Violated the Due Process Clause of the Constitution and the Policy of Mistretta.

On January 18, 1989, this court upheld the constitutionality of the Sentencing Reform Act and the Sentencing Guidelines promulgated by the Sentencing Commission. Mistretta v. United States, 488 U.S. 361, 109 S. Ct. 647 (1989) As this Court stated in Mistretta, the Sentencing Guidelines are binding on the courts. 488 U.S. at 366, 109 S.Ct. at 652. The Guidelines are a set of rules that are designed to limit the discretion of the courts for the purpose of preventing disparity in sentencing. U.S.S.G. 201.1 (b)(1), provides for a two-level enhancement if the defendant is in possession of a dangerous weapon during the commission of the offense. Petitioner was never found in possession of a weapon, nor were there ever indication that he had used one or knew that others used them, or that any weapon was within close proximity. Nevertheless, primarily on the basis that he was also considered a manager or supervisor of the cocaine distribution conspiracy of which Maldonado was found guilty, the enhancement was added. The commentary to that section provides that in cases of criminal conspiracy, a defendant is accountable for the conduct of others undertaken in furtherance of the conspiracy that was "reasonably foreseeable by the defendant." U.S.S.G. 1B1.3. The Ninth and Eleventh Courts of Appeal have differed on their interpretation of "reasonably foreseeable" and the test to be applied for assessing the weapon enhancement, and the conflicting tests should be resolved by this Court.

In United States v. Garcia, 909 F.2d 1346 (9th Cir. 1990) the Ninth Circuit Court of Appeals considered a U.S.S.G. 2D1.1(b)(1) enhancement from a "close proximity" case.

Although the Garcia court stated out that there is no presumption as to the presence of a firearm in illicit narcotics transactions, they

acknowledged that trafficking in narcotics is very often related to the carrying and use of firearms, and held that

". . . in light of the large amount of drugs involved in this case, Soto's possession of the gun was reasonably foreseeable." Id. at 1350.

In contrast, Maldonado requests this Court to adopt the test used by the Eleventh Circuit Court of Appeals to maintain uniformity in rulings between the various Courts of Appeals, and to limit the discretion of judges to prevent disparity in sentencing, as mandated by Mistretta.

In United States v. Ortero, 890 F.2d 3661 (11th Cir. 1989), the Eleventh Circuit established a three-part test. First, the possessor must be charged as a co-conspirator; second, the co-conspirator must be found to have been possessing a firearm in furtherance of the conspiracy; and third, the defendant who is to receive the enhanced sentence must have been a member of the conspiracy at the time of the firearms possession.

Although this Court has previously applied any particular test, application of the Ortero test with the requirement of "reasonable foreseeability" would insure protection to defendant from unwarranted sentence enhancements, over which he has little or no control and which deny due process in their imposition, while still ensuring that the ends of justice are met. Certainly, although now there is no presumption of the presence of firearms at drug sales, the net effect of the "reasonably foreseeable" test alone as applied in Garcia, is very onerous and difficult to defend, and necessitates that there be some nexus between the weapon and the crime. As the commentary to the Sentencing Guidelines sets forth:

> Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonable foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such

> conduct is not included in establishing the defendant's offense level under this guideline. U.S.S.G. 1B1.3, comment. (N.1).

The application of the Ortero rule, which requires that the co-conspirator possess a firearm in furtherance of the conspiracy an that the defendant must have been a member of the conspiracy at the time of the firearms possession better reflects the intent of Congress in adopting the Guidelines, and protects the Due Process Rights of the Defendant. Requiring a more direct nexus with the weapon, rather than simply applying the enhancement because the Defendant may be closely involved with the leader of the organization, provides the limit to judicial discretion mandated by Mistretta.

II. The Introduction of Evidence Membership of a Prior California Conspiracy and Gang, Constituted a Constructive Amendment of the Superseding Indictment of the Idaho Conspiracy, and was More Prejudicial than Probative.

The Ninth Circuit's allowance of the introduction of evidence of gang affiliations with former Los Angeles gang was highly prejudicial and improper, and is in apparent conflict with several state decisions concerning the relevance of gang membership. Further, the introduction of such evidence constitutes a constructive amendment of the Superseding Indictment, which alleges the defendants conspired between January 1989 and January 8, 1990 to distribute or possess with the intent to distribute cocaine. While the Indictment charges only one conspiracy, it is clear on the face of the Indictment that more than one conspiracy is alleged. The evidence clearly pointed to two distinct conspiracies, one in California and one in Idaho, the former being outside the scope of the Superseding Indictment. It is improper for the Government to charge a single

conspiracy when multiple conspiracies are in fact involved. United States v. Durades, 607 F.2d 818 (9th Cir. 1979)

In such cases, proof at trial is subject to impermissible variance resulting in prejudiced results because evidence admitted at trial as to one offense may be inadmissible as to the other offense. United States v. Pavloski, 574 F2d. 933, 936 (7th Cir. 1978)

The danger inherent in the present indictment was described in Kotterakos v. United States, 328 U.S. 748, 90 L.Ed.1157, 1568-1569 (1945):

> The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose in the various applications for loans.
>
> This view, specifically embodied throughout the instructions, obviously confuse the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character.

On its face, the Indictment clearly alleges circumstances which dictate that if there were any conspiracies, there were not more than one, and yet the proof provides a " . . . complex of facts distinctly different from those set forth in the charging instrument . . ." United States v. VonStoff, 726 F.2d 584 (9th Cir. 1984).

United States v. Lurtz, 666 F.2d 69 (1981) is instructive on determining whether there is one or two conspiracies. Clearly, in the instant case, any evidence of California gangs involves a separate,

uncharged conspiracy that would not be admissible in allegations of the conspiracy commencing January 1989. The introducing of such evidence as to Petitioners was error.

No gang relation of any kind between Maldonado and the Thirty-eighth Street Gang was ever established. Only one officer ever indicated that he thought he recalled even seeing Appellant in California, and he was not that sure of his identification. (Tr.p.262, lines 17-21; p. 263, lines 1-13) Mr. Maldonado had none of the contacts, tatoos, criminal record or other indicia of a member of any gang, and only had a nickname "Primo" (meaning cousin, which in fact he was). As the court held in United States v. Mann, 590 F.2d 361 (1978), it is improper to admit evidence of prior association with a known drug dealer when there is limited rational connection with that association and the present crime charged. The prosecutor argued that there was too much coincidence in two

separate events, and that the Defendant "was arrested because of the same type of parade." Id. at 369 The prejudice in Mann, as well as in the instant case, is that "the jury might feel not only that defendant was a law breaker, but that he ran with other such law breakers." Id. at 370

Evidence of gang membership can, be admitted under certain circumstances, to show identity, motive, common design or purpose. However, mere tendency to show that a person runs with a particular gang, implied by tatoos or other evidence, is not necessarily relevant. State v. Balloutyne, 623 P.2d 857

(Ariz. 1981) Further, the admission of evidence of a defendant's membership in a gang or gang related shooting can often be an abuse of discretion because of the highly prejudicial nature of such evidence. People v. Perez, 170 Cal. Reptr. 619 (1981) Gang membership evidence

is so highly prejudicial because it allows the jury to infer guilt on a theory of "guilty by association," with little reliance on other evidence. Thus, although evidence of gang membership is not per se inadmissible, it must meet the test of relevancy and have a tendency to prove some aspect of the case. See People v. Cadeuas, 647 P.2d 569 (1982); People v. James, 282
N.E. 2nd 760 (1972).

The Ninth Circuit ignored the ramifications of not only the prejudicial nature of such prior gang membership evidence, but also the fact that it constituted a constructive amendment to the allegations of the Superseding Indictment.

III. The crime of money laundering as defined at 18 U.S.C. 1956 was not intended by Congress to include all expenditures of illegally gained proceeds regardless of the intent of the expenditure.

The United States argued to the jury, which argument the Ninth Circuit upheld, that a conviction of money laundering pursuant to USC 1956 requires only that expenditures need to be made by petitioners with the knowledge that the money spent was derived from the proceeds of illegal drug sales. Counsel for the United States argued:

> "The houses, where you can hide the dope, so you can break it down, have people coming over and use it, whatever you want to do. All of those things is spending with the idea – and remember there is two parts to this – it's either/or – to promote the business or to conceal the nature, location, source, ownership or control. When you think about those things, either one or the other, you will find that every single expenditure in some way was used to

> promote their primary purpose for being in this community – to sell dope – everything that they did." (Tr. Vol. XIV, p. 2413).

Referring to United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), the Ninth Circuit panel here interpreted 18 USC 1956 to alternatively allow proof beyond a reasonable doubt that the defendant conducted a financial transaction involving unlawful proceeds, knowing the proceeds were illegally gained, either with the intent to promote the unlawful activity or with the knowledge that the transaction was designed to conceal or disguise the nature, location, source ownership or control of the proceeds. (App. p. 3 of Memorandum decision). The Ninth Circuit found sufficient evidence to support the convictions of petitioners based upon transactions which tended to promote the illegal activity. The interpretation of the United States, affirmed by the Ninth Circuit, essentially allows conviction upon any transfer of illegal proceeds even if the expenditure only tends to provide sustenance to petitioners. By asserting that petitioners' presence in Idaho was only related to illegal activity, all expenditures, whether for food or otherwise, therefore becomes a violation of 18 USC 1956. In petitioners' cases such expenditures as making a down payment upon a house in which to live or a down payment upon a motor vehicle constituted the crime of money laundering.

Petitioners aver that the lower courts have interpreted 18 USC 1956 to encompass the mere expenditure of proceeds of illegal gains, rationalizing that since all "financial transactions" can in some way promote the health of welfare of the defendant, all expenditures would be circumscribed within the provision. As a result of that interpretation, the qualifying language which

statutorily defines the criminal conduct, has effectively been discarded or broadened to surplusage. As drafted by Congress, 18 USC 1956 requires a "financial transaction" in which the defendant had both knowledge of the nature of the illegal proceeds an an intent to promote the illegal activity. The United States successfully argued here that all expenditures qualify as prohibited activity. Congress did not intend such a result.

IV. The speedy Trial Act, 18 USC 3161 et seq. was not intended by Congress to be used as a administrative vehicle to subjugate the Constitutional right to a speedy trial.

Petitioners spent from January 8 through trial held from July 9 to July 26, 1990, in custody. Upon challenge to the pretrial incarceration as violative of petitioners' speedy trial rights the Ninth Circuit concluded that the district court properly determined that the Speedy Trial Act "clock" did not begin to run during the entire period of incarceration. Consequently, no violation of the act occurred. Relying upon United States v. Halliburton, 870 F.2d 557 (9th Cir.), cert. denied, 492 U.S. 910 (1989), the Ninth Circuit also determined that petitioners' Fifth Amendment claim of excessive pretrial incarceration was mooted because of the convictions. In light of the discussions of the Speedy trial Act in United States v. Salerno, 481 U.S. 739, 95 L.Ed.2d 697, 107 S.Ct. 2095 (1987), Petitioners request the Court to assess the actual impact of the Speedy Trial Act upon pretrial incarceration.

When upholding the Bail Reform Act, 18 USC 3141 et seq., Chief justice Renquist noted the provisions of the Speedy Trial Act established "stringent time limitations" upon the speed at which a trial will proceed. In part at least, the Salerno court reasoned

that pretrial incarceration pursuant to the Bail Reform Act meets the regulatory needs demanded by Congress, but does not run afoul of the Constitutional requirements of Due Process because of the existence of the Speedy trial Act. The Court observed:

> "...The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious crimes...The arrestee is entitled to a prompt detention hearing, ibid, and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act..." Salerno, at 95 L.Ed2d 709.

Contrary to the observation of the Court in Salerno, the "excludable time" articulations at 18 USC 3161(h), effectively emasculate the "stringent time limitations" so important to the speedy Trial Act.

The present petition reflects the all too common operation of the Speedy Trial Act upon pretrial incarceration. Petitioners remained jailed pursuant to the Bail Reform Act for more than six months awaiting trial, and the district court properly concluded pursuant to the Speedy Trial Act that the "clock" had yet to be started. Simply, no days had elapsed during the six month of incarceration for Speedy Trial Act consideration. Certainly, the Act can provide no solace to a defendant. Furthermore, with the inclusion of the concept of "excludable time" within the act, the Act becomes a management device for the courts, rather than a Congressional attempt to place definition upon the Constitutional right to a speedy trial or provide guidance upon the concept of deprivation of liberty without due process of law.

Additionally, when analyzing the Fifth Amendment considerations raised to pretrial incarceration by petitioners, the Ninth Circuit panel here deferred to the statute itself in its

discussion of the delay. The Ninth Circuit panel noted that because petitioners filed some pretrial motions, petitioners must bear the blame for four of the six months delay. In other words the mere filing of procedural motions translates into "fault" for Fifth Amendment purposes. The filing of the motions by petitioners caused no delay whatsoever. During the six months preceding trial the district court scheduled one hearing to dispose of all motions, with the hearing scheduled after the grand jury issued a second superceding indictment and an "interest of justice" trial rescheduling, and before the issuance of the third superceding indictment. In effect both under the Speedy Trial Act and the Fifth Amendment analysis, one who tries to defend himself losses most, if not all, the guarantees to Due Process and a speedy trial.

V. Counsel for the United States should not be allowed to vouch for the credibility of the only co-conspirator who testified at trial.

During trial of petitioners, the United states presented the the testimony of Jose Valladares as its prime witness to establish the nature and extent of the charged conspiracy. In the course of rebuttal argument counsel for the United States remarked to jury:

> "...Counsel suggest you can't believe Jose Valladares. Jose Valladares is a life-long gang member; that's his life, that's his blood. Jose Reyes is his friend. He not only admitted his guilt; he is going to prison, and when he gets out of prison, he is going to be deported from this country. And he took the stand and had to testify about his friend. Do you think anyone takes that lightly? Do you think that a person in his situation would ever get back to his home or family after doing that? Jose

> Vailadares, I would suggest to you, is a credible witness. He has admitted his own guilt and he also has told the truth about what he knows."
>
> ...
>
> "...You've seen the evidence; it has been presented to you exhaustively over the last three weeks. You know what happened, and you will be able to find beyond a reasonable doubt that they committed these crimes as charged. That is your duty, and that is what justice requires. Justice is what the guilty fear in this case. Thank you." (Tr. Vol. XIV, pp. 2410-21, 2422).

Counsel for petitioners did not object to the impropriety of the closing comments, which regulates review to the "plain error" standard found at Federal rule of Criminal Procedure 52(b). A "plain error" review requires conduct that:

"...seriously affect the fairness, integrity or public reputation of judicial proceeding." United States v. Atkinson, 297 U.S. 157, 260, 80 L.Ed. 2d 555,56 S.Ct 391

The ABA Standards for Criminal Justice in Existence in 1980 in part provided:

"Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." (Comments to 3-5.8).

Any review of the ethical considerations of advocacy should be reviewed in its entirety. The Ninth circuit found the comments within the bounds of advocacy and acceptable comment upon evidence. Relying upon United States v. Young, 470 U.S.1, 84 L.Ed2d 1, 105 S.Ct. 1038 (1987), petitioners assert that counsel for the United States vouched for the credibility of the lone co-conspirator chosen by the United States to provide substantial testimony against petitioners. Counsel for the government told the jury that Jose Valladares "told the truth". After expressing the opinion of counsel, and implicitly the weight of the United States, that Jose Valladares told the truth, counsel for the government implored the jury to abide by its "duty" and "find beyond a reasonable doubt that they committed these crimes as charges"...and "... that is what justice required." (Tr. Vol. XIV, p 21422). The argument of counsel for the government exceeded the bounds of fair comment upon the evidence by vouching for the credibility of the prime witness for the prosecution.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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Dated : July 13, 1992

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARIA AVILA, A/K/A Patty Reyes,
ADRIAN NIEVES MALDONADO,
ANA ROSA REYES, and JOSE REYES,

Defendants-Appellants.

Nos. 90-30221, 90-30385, 90-30386, 90-30401

D.C. No. CR-89-40020-EJL

MEMORANDUM *

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted March 3, 1992
Seattle, Washington

Filed April 16, 1992

Before: WRIGHT and ALARCON, Circuit Judges, and FONG, District Judge**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable Harold M. Fong, Chief Judge, United States District Court for the District of Hawaii, sitting by designation.

Maria Avila, Adrian Maldonado, Ana Reyes (A. Reyes), and Jose Reyes (J. Reyes) appeal from the judgment of conviction. A. Reyes and Maldonado seek reversal of their sentences. We discuss each contention and the facts pertinent thereto under separate headings. We affirm the judgment of conviction as to each appellant and the sentences imposed against A. Reyes and Maldonado.

DISCUSSION

I. Sufficiency of the Evidence

The appellants contend that the Government failed to present sufficient evidence to support their convictions for specific acts of money laundering (18 U.S.C. § 1956 (a) (1) (A) & (B)). conspiracy to launder money (18 U.S.C. § 1956 (a) (1) (A) & (B) ; 18 U.S.C. § 371), and conspiracy to distribute cocaine (21 U.S.C. § 846).

In considering a challenge to the sufficiency of the evidence, where the issue has been preserved for appeal, we must determine whether "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" United States v. Floyd, 945 F.2d 1096, 1098 (9th Cir. 1991) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original)).

In the instant matter, only Avila and A. Reyes objected to the sufficiency of the evidence at the close of trial. A failure to object to the sufficiency of the evidence at the close of trial waives the issue on appeal. Id. at 1098; United States v. Mora, 876 F.2d 76, 77 (9th Cir. 1989). Where such a waiver has occurred, we nonetheless review the sufficiency of the evidence under the less stringent plain error standard. Floyd, at 1098; Mora, at 77. Thus, we review the sufficiency of the evidence to support the judgment

of conviction of Maldonado and J. Reyes for plain error. Under the plain error rule, and appellant must demonstrate that his conviction involved a "manifest miscarriage of justice." United States v. Patton, 771 F.2d 1240, 1243 (9th Cir. 1985).

A. SPECIFIC ACTS OF MONEY LAUNDERING

In order to support a conviction for money laundering under 18 U.S.C. § 1956(a)(1), the Government has the burden of proving beyond a reasonable doubt that the defendant (1) conducted a financial transaction that involved the proceeds of unlawful activity, (2) that he knew the property involved was the proceeds of some form of unlawful activity, and that he did so either (3) with the intent to promote the unlawful activity (18 U.S.C. § 1956 (a)(1)(A)(i)) or (4) with the knowledge that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of those proceeds (18 U.S.C. § 1956 (a)(1)(B)(i)). United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991). All four appellants were convicted of conspiracy to launder money and specific acts of money laundering under 18 U.S.C. § 1956 (a)(1)(A) & (B) and 18 U.S.C. § 371 for their respective involvement in various wire transfers and purchases of automobiles and residences. They contend that their convictions were not supported by the evidence because the Government failed to satisfy the requisite elements of section 1956 (a)(1). We reject appellants' contention.

1. "Financial Transaction"

J. Reyes and Maldonado contend that the purchase of an automobile or residence with cash is not a "financial transaction" within the meaning of section 1956 (a)(1). This argument ignores the definitional portion of the statute. Under section 1956 (c)(3), "the term 'transaction' includes a purchase [or] sale ...." Furthermore, section 1956(C)(4)(A) defines the term "financial transaction" as a transaction "involving the movement of funds by wire or

other means ...." Because the act of buying a house or automobile with cash is a purchase involving the movement of funds, we hold that the Government has satisfied the financial transaction requirement of section 1956 (a)(1). See also Uniter States v. Blackman, 904 F.2d 1250, 1257 (8th Cir. 1990) (holding that the sale of a truck between the defendant and a third party was a financial transaction within the meaning of section 1956 because "[t]he term includes the purchase, sale or disposition of any kind of property as long as the disposition involves a monetary instrument.")

2. Proceeds of "Specified Unlawful Activity"

Appellants contend that the Government did not present sufficient evidence to prove that the funds used in their suspect financial transactions were proceeds of drug distribution. They argue that the Government's proof was inadequate because it consisted solely of evidence that appellants wired large sums of money and purchased residences and motor vehicles during a period in which they had no legitimate source of income. Avila argues separately that the Government's evidence against her was inadequate because testimony at trial demonstrated that some, if not all of the money used in her transactions was legitimate income derived from her ownership of a clothing store known as "L.A. Fashions."

The appellants correctly cite Blackman for the proposition that the Government's case "cannot rely exclusively on proof that a defendant charged with using proceeds from an unlawful activity has no legitimate source of income." 904 F.2d at 1257. Blackman also states, however, that "the government's burden on a particular element of [money laundering] may be satisfied by circumstantial evidence as long as it is sufficient to prove that element beyond a reasonable doubt." Id.

Reviewing the record in the light most favorable to the Government, we conclude that the Government presented suffi-

cient circumstantial evidence from which a rational jury could infer that appellants' wire transfers and purchases involved proceeds of drug distribution. Contrary to the appellants' assertions, the Government's evidence did not consist solely of proof that they had purchased expensive items and transferred large sums of money without a legitimate source of income. Instead, the jurors were also presented with substantial evidence from which they could infer that the money used to purchase items and wired to Los Angeles was derived from the illegal sale of cocaine.

We also reject Avila's claim that her ownership of L.A. Fashions defeated the Government's evidence by establishing that she had a legitimate source of income to support the suspect financial transactions. Contrary to Avila's contention, the Government was not required to disprove that any of the money used in Avila's transactions was derived from a legitimate source. Instead, the Government was required to present the jurors with evidence from which they could infer beyond a reasonable doubt that the funds were the proceeds of drug distribution. The Government has met this burden. In addition to evidence that appellants derived substantial income from cocaine sales, the Government also demonstrated that L.A. Fashions was not operated as a normal commercial store. Katie David, the manager of the mall where L.A. Fashions was located, testified that the store had only a limited inventory, did no advertising, and was open on irregular hours. She also noted that the revenues from the store amounted to approximately $1000 per month, a figure well below the $3000 generally required to keep a store of that kind in operation.

3. Knowledge of Unlawful Source of Proceeds

Avila argues that the Government failed to prove that she knew any of the money came from the distribution of drugs because a government informant, Juan Villareal, testified at trial that Hispanic men often deny their women knowledge of what

they are doing. A. Reyes claims that her involvement in the purchase of the car and house was in keeping with the Idaho custom of having husbands and wives co-sign agreements for major expenditures. We disagree.

The evidence produced by the Government demonstrates that A. Reyes was present at the scene of at least one major drug transaction in which a diaper bag belonging to her was used to transport 20 ounces of cocaine. The record also shows that narcotics were stored in Avila's place of residence, and that Avila's Cadillac Cimarron was used to transport cocaine. Thus, the evidence was sufficient to persuade a rational jury that A. Reyes and Avila had knowledge that the money came from the distribution of narcotics.

4. Intent to Promote Unlawful Activity

The appellants contend that the Government failed to prove that their wire transfers and purchases were conducted with an intent to promote the distribution of drugs. This contention is without merit.

A representative from the Western Union wire service testified that drug traffickers commonly use wire services to launder drug money. The expert also testified that certain factors are indicative of drug-related transfers, including (1) the use of business fronts, or legitimate businesses that may or may not generate profits, to account for funds derived from illegal activities, (2) the use of code words in wire communications, (3) the frequency of the transfers, (4) whether the transfer is for an amount greater than $500, and (5) whether the transfer is destined for a city which serves as a base for drug trafficking organizations.

Jose Valladares testified that members of J. Reyes' drug operation used wire transfers to move money to Los Angeles to purchase drugs. Valladares also testified that these transfers involved the use of code words. We are persuaded that the

Government presented sufficient evidence to convince a rational jury that the appellants intended to promote drug activity through the use of wire transfers.

The Government presented evidence that motor vehicles were purchased by members of the conspiracy. A rational jury could infer that these motor vehicles were used to further the appellants' drug trafficking operation. Evidence was presented that members of the drug operation smuggled cocaine from Los Angeles to Idaho in spare tires and in wheel rims. The record also shows that Avila's Cadillac, as well as Chevrolet pickup and minivan owned by Maldonado and A. Reyes were used to transport cocaine. Videotapes were introduced into evidence that depicted Avila's Cadillac and Maldonado's Corvette at the scene of drug transactions. The odometers on some of the appellants' vehicles, such as Maldonado's and A. Reyes' 1989 Chevrolet pickup, showed that they had a high mileage reading. This evidence could support an inference that these vehicles were used to make trips to and from Los Angeles.

The Government also presented evidence that demonstrates that the Verdugo, Foothill, and Fredregill residences were used to facilitate the distribution of cocaine, or to house members of the drug organization travelling to Idaho.

5. Intent to Conceal Proceeds of Unlawful Activity

Appellants contend that the Government failed to prove that their purchases of motor vehicles and residences were conducted in order to conceal or disguise drug proceeds, because these transactions were made openly. We conclude that the Government was not required to prove that the appellants intended to conceal those proceeds.

Having already proved that the motor vehicles and residences were used to promote the drug operation under section 1956(a)(1)(A)(i), the Government was not under any obligation to prove that the purchases were also intended to conceal or disguise

drug proceeds under 1956 (a)(1)(B)(i). As we noted in Montoya, "subsections (A)(i) and (B)(i) are set forth in the disjunctive." 945 F.2d at 1076. Thus, the Government's evidence needs to satisfy only one of these two intent requirements. Id. Because the evidence was sufficient to persuade a rational jury that each of the other elements of money laundering were satisfied, we need not consider whether sustaining the judgment on this charge would result in a manifest miscarriage of justice.

B. CONSPIRACY CHARGE

Avila, A. Reyes, and Maldonado contend that the government failed to present sufficient evidence to convict them of conspiracy to launder money. All four appellants also contend that there was insufficient evidence to convict them of conspiracy to launder money. All four appellants also contend that there was insufficient evidence to convict them of conspiracy to distribute cocaine.

The elements of conspiracy are; (1) an agreement to accomplish an illegal objective, (2) coupled with one or more acts in furtherance of the illegal purpose, and (3) the requisite intent necessary to commit the underlying offense. United States v. Penagos, 823 F.2d 346, 348 (9th Cir. 1987). The existence of a conspiracy may be proven by circumstantial evidence that the defendants acted together for a common illegal purpose. Penagos, 823 F.2d at 348. Once a conspiracy exists, evidence establishing beyond a reasonable doubt a defendant's connection with the conspiracy, even though slight, is sufficient to convict a defendant of knowing participation in the conspiracy. United States v. Skillman, 922 F.2d 1370, 1373 (9th Cir. 1990), cert. dismissed, 112 S. Ct. 353 (1991); Penagos. 823 F.2d at 348.

1. Conspiracy to Launder Money

As discussed above, the evidence was sufficient to persuade a rational jury beyond a reasonable doubt that the appellants engaged in money laundering transactions in violation of 18 U.S.C. § 1956(a)(1). The evidence also supports the inference that the appellants agreed to commit specific acts of money laundering. All of the transactions for which the appellants were convicted involved at least two persons who had some connection to the appellants' drug distribution activities. Furthermore, the evidence of the nature of these transactions demonstrated that there was an agreement between the members of the conspiracy to launder money.

2. Conspiracy to Distribute Cocaine

The appellants contend that the Government failed to prove a single overall conspiracy as charged in the indictment, but instead proved that two separate conspiracies to distribute cocaine existed — one in Los Angeles and one in Idaho. appellants argue that the proof of two conspiracies resulted in a fatal variance between the indictment and the proof offered at trial. "The question of whether a single conspiracy has been proved, rather than multiple conspiracies, is a recurring one, which is essentially a question of the sufficiency of the evidence." United States v. Bibbero, 749 F.2d 581, 586 (9th Cir. 1984), cert. denied, 471 U.S. 1103 (1985).

In United States v. Arbelaez, 719 F.2d 1453, 1457-58 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984), we stated:

> To establish the existence of a single conspiracy, as compared to multiple conspiracies, the basic "test is whether there was 'one overall agreement' to perform various functions to achieve the objectives of the conspiracy"
>
> . . . . .
>
> To determine whether the evidence supports the existence of one overall criminal venture, relevant areas of inquiry include "the nature

> of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of times and goals."

(citations omitted); see also United States v. Brown, 912 F.2d 1040, 1043 (9th Cir. 1990) (quoting Arbelaez).

After reviewing the record in the light most favorable to the Government, we conclude that there was sufficient evidence from which a rational jury could infer that appellants were engaged in a single conspiracy, and that there was no material variance between the Government's proof at trial and the indictment. The Government's evidence revealed that the appellants initially became involved in the sale of cocaine in Los Angeles. All four appellants then moved to Idaho and continued to distribute cocaine after J. Reyes was informed that he could get more money for the cocaine in Idaho. After the appellants moved to Idaho, they and other members of the conspiracy regularly traveled back to Los Angeles to replenish their drug supply. In addition, J. Reyes induced numerous individuals who had sold drugs for him in Los Angels to come and sell drugs for him in Idaho, including Juan and Jose Valladares, Gabriel Delgado, and Enrique Rivera. Rather than suggesting the existence of separate conspiracies, this evidence shows that the conspiracy merely changed its principal place of business. The illegal activity in question (i.e. the distribution of cocaine) remained the same, as did many of the participants.

A. Reyes, Avila, and Maldonado also contend that the evidence does not show that they were members of the conspiracy. The record contains evidence of each appellant's involvement in the sale of cocaine.

The Government presented evidence that A. Reyes and Maldonado were involved in the sale of 20 ounces of cocaine to a government informant at a motel in Pocatello, Idaho. The record

also demonstrates that Avila's name was in a drug ledger found at her Verdugo Street residence. Avila wrote a note to J. Reyes in the ledger that states "I love you." Material used to package and weigh drugs and small amounts of drugs were seized during a search of Avila's residence.

The Government also presented evidence that a white Cimarron Cadillac registered in Avila's name contained a secret compartment in the trunk. Narcotics agent Clark Rollins testified that this type of secret compartment is commonly used to smuggle drugs in cars. Only a slight connection is necessary to prove a defendant's involvement in a conspiracy. Skillman, 922 F.2d at 1373. The Government met its evidentiary burden in this matter as to each appellant.

II. Constructive Amendment of the Indictment

On June 14, 1990, approximately four weeks prior to trial, the grand jury issued a third superceding indictment against the four defendants. Appellants were charged with conspiracy to distribute cocaine "from an unknown date, but at least between the dates of January 1989 and January 8, 1990." Appellants argue that the Government presented evidence of their involvement in cocaine and heroin trafficking prior to 1989. they contend that the trial court committed reversible error in admitting this evidence because this proof effected a constructive amendment of the indictment. We conclude that the admission of the challenged evidence of conduct that occurred before 1989 was not a constructive amendment of the indictment.

We explained in United States v. Von Stoll, 726 F.2d 584 (9th Cir. 1984), that:

> [a]n amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed on them.

Id. at 586. Constructive amendment has been found where a "complex of facts distinctly different from those set forth in the charging instrument" is proved at trial. Id.

The evidence of prior drug-related conduct in California did not diverge from the allegations of the indictment. The indictment clearly charged a conspiracy beginning at some unknown time prior to January 1989. This testimony merely corroborated the evidence that appellants distributed cocaine in Idaho after January 1989. There is no reason to believe the grand jury would not have indicted the appellants had this evidence been available to it. See Von Stoll, 726 F.2d at 586 (nothing that "courts have found constructive amendments where the crime charged was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved.").

III. Evidence of Gang Involvement

Appellants contend that the trial court erred in allowing the Government to introduce evidence that their drug operation was connected with a Los Angeles street gang know as the 38th Street Gang. They argue that the evidence of association with a street gang was irrelevant and prejudicial, and should have been excluded by the district court in response to Jose Reyes' pretrial motion in limine.

"A trial court has great latitude in the admissibility of evidence. Decisions whether evidence is relevant (Federal Rules of Evidence 401) and whether its probative value outweighs unfair prejudice to the defendants (Federal Rules of Evidence 403) are committed to the court's sound discretion." United States v. Gilley, 836 F.2d 1206, 1213 (9th Cir. 1988). Under Rule 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Id. at 1213.

In the instant matter, the Government presented a limited amount of gang-related evidence. Most of this evidence was contained in the testimony of Jose Valladares. The Government offered evidence concerning the 38th Street Gang in order to show how Valladares became acquainted with J. Reyes. This testimony was relevant to show how the conspiracy waf formed. It was also relevant to prove that various members of the drug operation used their gang nicknames and code words in conducting drug and money laundering transactions. The district court properly admitted evidence of gang affiliation and participation to show the origin and the manner in which the conspiracy conducted its illegal activities.

Appellants respond that proof of the origin of the conspiracy and the "common thread" linking the individuals involved in J. Reyes' drug operation was unnecessary and therefore prejudicial because it could have been established by demonsatrating that the appellants all had family relationships to each other. This argument is devoid of merit.Although the appellants do have family ties to one another, other members of the conspiracy did not. Furthermore, we have held that "proof of a familial relationship with a conspirator is not sufficient to connect the accused to a conspiracy." United States v. Loya, 807 F.2d 1483, 1488 (9th Cir. 1987). the district court did not abuse its discretion in admitting evidence that appelants' drug operation had connections to gang activity.

IV. Severance

Before trial, A. Reyes, Avila, and Maldonado filed individual motions to sever their respective trials from that of the other defendants pursuant to Rule 14 of the Federal Rules of Criminal Procedure. The district court refused to grant severance. Appelants did not renew their motions to sever at the close of trial. Appelants now contend that the district court abused its discretion in denying their severance motions. We decline review of this

issue because it has been waived. United States v. Plache, 913 F.2d 1375, 1378 (9th Cir. 1990) (failure to renew a motion to sever at the close of trial waives appelate review); United States v. Smith, 893 F2d at 1573, 1581 (9th Cir. 1990) (same.)

V. Jury Selection Challenges

Appellants object to the manner in which the jury was selected. First, they argue that the members of the jury panel did not represent a fair cross-section of the community in violation of the Sixth Amendment and the Jury Selection and Service Act, 28 U.S.C. §§ 1861-63. Second, they assert that the Government's use of a peremptory challenge to remove the only Hispanic juror deprive them of their Fifth Amendment right to due process.

We decline review of appellants' claim that the jury panel did not represent a fair cross-section of the community, because appellants raise the issue of improper jury selection for the first time on appeal. Rule 12(b) of the Federal Rules of Criminal Procedure forecloses objections to the petit jury array that are not made prior to trial. See Shotwell Mfg. Co. v. United States, 371 U.S. 341, 362-63 (1963) (petitioners' objection that the clerk of the district court failed to employ a jury selection method designed to secure a cross-section of the population was lost under Rule 12 (b)(2) because petitioners failed to object prior to trial); United States v. Hearst, 638F.2d 1190, 1196 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981) (challenges to the selection of the petit jury are waived under Rule 12 (b)(2) if not raised before trial). Similarly, in order to challenge compliance with the provisions of the Jury selection and Service Act, a defendant must move to dismiss the indictment or stay the proceedings against him "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor. . . ." 28 U.S.C. § 1867 (a); Paige v. United States, 493 F.2d 22. 23 (9th Cir.). cert. denied, 417 U.S. 935

(1974) (defendant's post-trial objection to the jury selection was too late under both Fed. R. Crim. P. 12(b)(2) and 28 U.S.C. § 1867 (a)).

We also refuse to consider appellants' argument that the Government improperly used its peremptory challenge to exclude the only Hispanic juror, because the appellants failed to object to this challenge at trial. Dias v. Sky Chefs, 948 F.2d 532,534 (9th Cir. 1991), cert. denied, 60 U.S.L.W. 3537 (U.S., March 9, 1992) (No. 91-1167).

VI. Prosecutorial Misconduct in Closing Argument

Appellants contend that the Government improperly vouched for the credibility of Jose Valladares. The prosecutor made the following statement during closing argument:

> Counsel suggests you can't believe Jose Valladares. Jose Valladares is a life-long gang member; that's his life, that's his blood. Jose Reyes is a friend. He not only admitted his guilt; he is going to prison, and when he gets out of prison, he's going to be deported from this country. And he took the stand and had to testify about his friend. So you think anyone takes that lightly? So you think that a person in his situation would ever get back to his home or family after doing that? Jose Valladares, I would suggest to you is a credible witness. He has admitted his own guilt and he also has told the truth about what he knows.

The appellants also contend that the Government's closing argument was intended to incite passion and prejudice against them. Because the appellants failed to object at trial, this court reviews these alleged errors "in the context of the entire record to determine whether [they] rise[] to the level of 'plain error.'" United States v. Wallace, 848 F.2d. 1464, 1473 (9th Cir. 1988) (quoting United Stated v. Young, 470 U.S. 1. 16 (1985)).

A. VOUCHING

Although a prosecutor generally may not express his belief in the credibility of a government witness, United States v. McKoy, 771 F. 2d. 1207, 1210-11 (9th Cir. 1985), he must be given a reasonable latitude to fashion a closing argument. United Sates v. Molina, 934 F. 2d. 1440, 1445 (9th Cir. 1991). "Inherent in this latitude is the freedom to argue reasonable inferences based on the evidence, "including the inference that, in a case with two conflicting stories, "one of the two sides is lying." Id. In United Stated v. Laurins, 857 F. 2d. 529 (9th Cir. 1988), cert. denied, 492 U.S. 906 (1989). we held that a prosecutor's statement that the defendant was a liar was not plain error where the prosecutor "indicated that it was 'after listening to all the evidence' that he reached this conclusion." Id. at 539. Based on this qualifying language, this court concluded that the jury could have construed the prosecutor's statement as a comment on the evidence rather than as an assertion of personal belief. Id.

In the instant case, the prosecutor merely suggested that Valladares was a credible witness after summarizing the evidence that supported that conclusion. Appellants have failed to demonstrate that the prosecutor's conduct resulted in a miscarriage of justice.

B. PREJUDICIAL COMMENTS

Appellants contend that the prosecutor's closing argument contained numerous remarks intended to inflame fears and passions in the jury. Appellants object to the following comments:

> [T] he "flaunting of wealth" that the good members of the jury would work a year to be able to spend the quantities of money that these defendants spent;- about a continuing deceiving of the system; the "crushing" "your bible" and "continuing to lie to you,"; about "preying on the weakness of others";

> that "I think what you should know at his point is that the greed associated with cocaine brings misery."; that "these people sitting back and enjoying the fruits of that misery"; that it "makes me angry";
> ....

These remarks were based on the evidence presented at trial or common knowledge. The prosecutor's comment did not constitute misconduct.

VII. Proof of a Continuing Criminal Enterprise

In order to convict a defendant of engaging in a continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848, the Government must prove:

> (1) that the defendant's conduct constituted a felony violation of federal narcotics law; (2) that the described conduct occurred as part of a continuing series of violations of federal narcotics law; (3) that the defendant undertook the activity in concert with five or more persons; (4) that the defendant acted as the organizer, supervisor, or manager of the criminal enterprise; and (5) that the defendant obtained substantial income or resources from the purported enterprise.

United Stated v. Hernandez-Escarsega, 886 F. 2d 1560, 1570 (9th Cir. 1989), cert. denied, 110 S. Ct. 3237 (1990); United States v. Sterling, 742 F. 2d 521, 525 (9th Cir. 1984), cert. denied. 471 U.S. 1099 (1985). J. Reyes contends that the district court erred in allowing the Government to argue that any narcotics crimes committed by co-conspirators in futherance of the conspiracy could be used asproof of "a continuing series of violations" under section 848. We disagree. In Hernandez-Escarsega, we expressly stated that substantive offenses committed by co-conspirators in futherance of the conspiracy can be attributed to the leader of the conspiracy for purposes of proving a continuing series of violations under CCE. Id. at 1572-73.

J. Reyes argues that Hernandez-Escarsega should be "revisited." This court does not have the authority to "revisit" Hernandez-Escarsega. Only an en banc court or the United States Supreme Court may over turn the holding of Hernandez-Escarsega. U.S. v. Salas, 879 F. 2d 530, 537 (9th Cir.), cert. denied, 493 U.S. 979 (1989).

VIII. Jury Instruction

A. Reyes contends that the district court erred in refusing to instruct the jury that the mere presence and association do not support an inference of participation in conspiracy. Ninth Circuit law is split as to whether a district court's refusal of a proposed jury instruction is reviewed under an abuse of discretion standard or de novo. United States v. Ayers, 924 F. 2d 1468, 1475 (9th Cir. 1991); United States v. Whitehead, 896 F. 2d 432, 434 (9th Cir.), cert. denied, 111 S. Ct. 342 (1990). This "intra-circuit conflict may be resolved through en banc proceedings." United States v. Slaughter, 891 F. 2d 691, 699 (9th Cir. 1989). Such proceedings are not necessary in the instant case, however, because the result would be the same under either standard if review. Id.

A. Reyes' proposed jury instruction No. 39 reads: "Mere presence at the scene of a crime or close association with conspirators alone will not support an inference of participation in a conspiracy." Although the district court initially refused to give this instruction, the court later included similar language in its instruction No. 41. Instruction No. 41 provides as follows:

> [O]ne who has no knowledge of a conspiracy, but happens to act in a way which futhers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a member merely by associating with one or more persons who are conspirators, nor merely by knowing of the existence of a conspiracy.

(emphasis added)

In Ayers, we stated that "'[a] trial judge is given substantial latitude in tailoring the instructions so long as they fairly and adequately cover the issues presented.'" 924 F.2d at 1475 (quoting United States v. Cruz, 783 F.2d 1470, 1472 (9th Cir.) cert. denied, 476 U.S. 1174 (1986); see also United States v. Echeverry, 759 F.2d 1451, 1455 (9th Cir. 1985) ("So long as the instructions fairly and adequately cover the issues presented, the judge's formulation of those instructions or choice of language is a matter if discretion." (citation omitted)). The court instructed the jury that mere association is insufficient to support a conviction for conspiracy. The court did not instruct the jury that mere presence is not enough. The failure to do so was not prejudicial because the evidence shows more than mere presence at the scene of the crime. The evidence shows that ,in addition to being present at a drug transaction involving 20 ounces of cocaine, A. Reyes had a diaper bag in he possession that was used to transport the cocaine.

IX. Speedy Trial Act and Pretrial Detention

Appellants J. Reyes and Maldonado contend that their right to a speedy trial under 18 U.S.C. § 1361 was violated because the district court failed to commence their trial within 70 days after their arraignments. J. Reyes also argues that the district court failed to articulate a sound justification for granting a six-month continuance of the starting date trial. Finally, J. Reyes and Maldonado contend that the district court violated their statutory and constitutional rights by failing to conduct an automatic review of their retrial detention status after the trial date was continued from March 20 to July 19. We conclude that the appellants' contentions lack merit.

A. COMPLIANCE WITH THE 70-DAY LIMIT

Under the Speedy Trial Act, a defendant must be brought to

trial within 70 days after the latter of the filing of the indictment or an appearance by the defendant before a judicial officer. 18 U.S.C. § 3161 (c). If a defendant is not brought to trial within the 70-day period, the court must dismiss the indictment upon the defendant's motion. 18 U.S.C. § 3162 (a) (2). In calculating the number of days between arraignment and trial, certain periods of delay are automatically exempted, including (1) time consumed by pretrial motions, "from the filing of the motion through the conclusion of the hearing on, or other prompt dispositions of such motion," and (2) delay resulting from a continuance granted by the court if the court finds that "the ends of justice served by the granting of such continuance outweighs the best interest of the public and the defendant in a speedy trial." In addition, the 70-day period does not begin to run until the date upon which the last codefendant is arraigned. 18 U.S.C. § 3161 (h) (7); see also Henderson v. United States, 476 U.S. 321, 323 & n.2. (1986) ("All defendants who are joined for trial generally fall within the speedy trial computation of the latest codefendant."); United States v. Morales, 875 F. 2d 775, 777 (9th Cir. 1989).

J. Reyes and Maldonado were arraigned on January 9, 1990. Shortly thereafter, the court ordered that trial by jury would commence March 20, 1990.

On January 19,1990, the original defendants in this case began filing pretrial motions. Co-defendant Samantha Flores filed a motion to sever. J. Reyes filed a motion for enlargement of time to file pretrial motions. On January 23, 1990, a magistrate extended the time to file pretrial motions until March 1, 1990. On January 29, 1990, Maldonado filed a motion to enlarge the time to file pretrial motions and a motion for a continuance of the trial date. Maldonado informed the court that he was prepared tp waive his right to a speedy trial and asked the court to postpone the trial for a minimum of six months. On February 15, J. Reyes filed a motion to change the situs of trial. On February 20, J. Reyes

filed a motion to dismiss the indictment.

On March 20, 1990, J. Reyes, Jose Valladares, Juan Valladares, Maldonado, A. Reyes, Enrique Rivera, Samantha Flores, Avila, and Fernando Mijarez were arraigned on a superceding indictment which added 14 counts of money laundering to the original indictment. Maldonado's motion for a continuance was granted to serve the ends of justice and allow counsel to prepare an adequate defense. The court also scheduled a hearing for May 14, 1990, to resolve all pending motions.

On April 10, 1990, co-defendant Gabriel Delgado was arraigned for the first time, following his extradition from California. On April 20, 1990, J. Reyes filed a second motion for enlargement of time to file pretrial motions. On the same day, both Maldonado an J. Reyes filed motions to dismiss on speedy trial grounds. Maldonado filed a third motion for enlargement of time to file pretrial motions on May 3, 1990.

On May 14, 1990, the district court heard numerous motions, including oral motions by J. Reyes and Maldonado for reconsideration of detention and J. Reyes and Maldonado's motions to dismiss on speedy trial grounds. The court denied these speedy trial motions on the ground that the clock had not yet begun to run. The district court explained that the speedy trial clock did not begin running until the date that Gabrial Delgado was indicted. The court also noted that the clock was stopped by the continuance, which acted to exclude all time until June 9, 1990. In addition, the district court held that the clock was stopped by the pretrial motions filed by the codefendants, including the motions by J. Reyes and Delgado.

A district court's method of computing excludable days under the Speedy Trial act reviewed de novo. United States v.Wirsing, 867 F. 2d 1227, 1229 (9th Cir. 1989). The factual findings underlying the district court's computation are reviewed for clear error. Id. As noted above, time granted for a continuance

is excludable for purposes of determining a defendant's right to a speedy trial. Thus, the district court in this case properly concluded that the running of the 70-day time limitation was tolled by the "ends of justice" continuance, which postponed trial until July 9, 1990. United States v. Gallardo, 773 F. 2d 1496, 1504-05 (9th Cir. 1985).

B. "ENDS-OF-JUSTICE" CONTINUANCE

J. Reyes contends that the district court failed adequately to justify its continuance of the trial date from March 20, 1990, to July 9, 1990. This court reviews a district court's decision to grant an "ends-of-justice" continuance for abuse of discretion. Gallardo, 773 F. 2d at 1501. The district court's factual findings underlying a decision to grant a continuance are reviewed for clear error. Id.

the district court granted a continuance in response to Maldonado's motion which stated that the case was very complex and that he would need at least six months to prepare. The court stated that it was granting a continuance in order "to allow counsel to adequately prepare a defense." The court also noted that it had weighed the ends of justice served by the continuance against the interest of the public and the defendants in a speedy trial. This justification was satisfactory under 18 U.S.C. § 1361 (8) (B) (ii) which states that a judge determining whether to grant an ends-of-justice continuance may consider.

> [w]hether the case is so unusual or complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

C. PRETRIAL DETENTION

J. Reyes and Maldonado contend that the district court violated 18 U.S.C. § 3164 (c) by failing to conduct an automatic review of their pretrial detention status after it granted continuance of the trial date. They also argue that the length of their pretrial confinement violated their sixth-amendment right to a speedy trial and their fifth-amendment right of due process.

1. Violation of 18 U.S.C. § 3164 (c)

18 U.S.C. § 3164 (c) states that "[f]ailure to commence trial of a detainee [in a period if ninety days following the beginning of a continuing detention] ... through no fault of the accused or his counsel ... shall result in the automatic review by the court of the conditions of release." In subsection (b), however, this statute specifically notes that "[t]he periods of delay enumerated in section 3161 (h) are excluded in computing the [90-day] time limitation ...." Because the time granted by the court for an "ends-of-justice" continuance is properly excludable under 3161 (h) (8), the district court's alleged failure to conduct an automatic review of appellants' pretrial detention did not violate § 3164 (c).

2. Constitutional Violations

J. Reyes' and Maldonado's Fifth and Sixth Amendment claims confuse the right to a speedy trial with the prohibition of excessive pretrial detention. With respect to the Sixth Amendment, an allegedly excessive period of pretrial detention cannot, in and of itself, violate a defendant's right to a speedy trial. Instead, length of pretrial detention is a factor in determining whether a violation has occurred. United States v. Turner, 926 F. 2d 883, 889 (9th Cir.), cert. denied, 112 S. Ct. 103 (1991). To determine whether the government has violated a defendant's constitutional right to a speedy trial, we must weigh the length of the delay, the reasons for the delay, the timeliness and manner of the defendant's assertion of his right to a speedy trial, and the

prejudice to the defendant caused by the delay. Id. Prejudice may result from oppressive pretrial incarceration, protracted anxiety and concern, and impairment of trial defense. Id.

In the instant matter, at least four months of delay in proceeding to trial was attributable to pretrial motions filed by J. Reyes and Maldonado. Given the appellants' extensive participation in the delay of trial, we hold that the delay did not deprive then of their right of a speedy trial.

We do not reach the merits of J. Reyes' and Maldonado's Fifth Amendment claim of excessive pretrial detention. The question whether they were detained for an unconstitutionally long period of time pending trial is now moot. Cf. United States v. Halliburton, 870 F.2d 557, 562 (9th Cir.), cert. denied, 492 U.S. 910 (1989) (the question whether a defendant was entitled to be free from governmental restraint during his trial is moot, after he has been convicted and sentenced to prison). Addressing the merits of this contention on appeal would result in an inappropriate advisory opinion. Id.

X. District Court's Application of the Sentencing Guidelines

A. MINIMAL V. MINOR PARTICIPANT IN THE OFFENSE

A. Reyes contends that she was entitled to be sentences as a minimal participant rather than as a minor participant under United States Sentencing Guidelines (U.S.S.G.) § 3B1. 2 because there was no direct evidence tying her to the conspiracy, and because the jury was allowed to assume that her association with her husband would make her part of the conspiracy. Whether A. Reyes is a minor or minimal participant under § 3B1.2 is a factual determination we review for clear error. See, e.g. United States v. Madera-Gallegos, 945 F.2d 264, 268-69 (9th Cir. 1991); United

States v. Tamez, 941 F.2d 770, 776 (9th Cir. 1991).

The sentencing judge concluded that A. Reyes was not a minimal participant because she "was convicted on four separate money-laundering charges, she served as a lookout at drug exchanges and one large drug deal was made using her diaper bag as a carrying case." The sentencing judge also noted that A. Reyes "along with the three other Defendants enjoyed the bulk of the profits from these drug sales." Based on these activities and the evidence of A. Reyes' participation in the conspiracy produced at trial, we conclude that the district court did not clearly err in finding that A. Reyes was a minor participant. See Madera-Gallegos, 945 F.2d at 269 (upholding the district court's determination that the wife of a drug dealer was a minor participant in the conspiracy to sell and distribute drugs because the wife had assisted drug transactions and, as part of one drug deal, the wife carried heroin in her lipstick container).

B. ENHANCEMENT FOR POSSESSION OF A FIREARM

Maldonado contends that the district court erred by adding two points to his base offense level under U.S.S.G. § 1B1.3 (a) (1) for the use and possession of firearms by his co-conspirators in the narcotics trafficking operation. Maldonado argues that this sentence increase was inappropriate because he was never found in possession of a weapon and because there was no evidence that he had ever used a weapon or knew that others used them. We disagree.

U.S.S.G. § 2D1.1 (b) (1) provides for a two-level upward adjustment in a defendant's base offense level "if a firearm or other dangerous weapon was possessed during the commission of the offense." The district court applied this enhancement to Maldonado through U.S.S.G. § 1B1.3 (a) (1), which required the

sentencing judge to consider all acts and omissions that occurred during the commission of the offense for which the defendant otherwise would be accountable. The commentary to section 1B1.3 (a) (1) explains that a defendant us otherwise accountable for the "conduct of others in futherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant." U.S.S.G. § 1B1.3, comment. (n.1) (emphasis added). Based on these guideline provisions, we have held that a defendant convicted of conspiracy to distribute cocaine may receive a sentencing enhancement for possession of a firearm by a co-conspirator, if the co-conspirator's possession of a weapon was reasonably foreseeable to the defendant. United States v. Vargas, 933 F.2d 701, 710 (9th Cir. 1991); United States v. Garcia, 909 F.2d 1346, 1349-50 (9th Cir. 1990), cert. denied, 112 S. Ct. 203-04 1991).

The district court specifically stated that is was not applying the firearms enhancement of Maldonado on the basis of any evidence that he personally possessed a weapon. Instead, the district court applied the enhancement on the basis of testimony at trial which revealed that other members of the conspiracy had possession of firearms and used these firearms in drug-related activities. Valladares testified that Maldonado, J. Reyes, and co-defendant Alex Mora had fired weapons at Rene Vera's car, because Vera has stolen a kilogram of cocaine from the drug operation. Valladares' testimony was corroborated by witness Tim Hansen and evidence of the damaged vehicle. Given this proof that guns were used in the course of the conspiracy, the only relevant inquiry is whether Maldonado reasonably could have foreseen his co-conspirators' possession of weapons. Whether a defendant reasonably could have foreseen his co-conspirators' possession of weapons is a factual finding reviewed for clear error. Garcia, 909 F.2d at 1349.

The district court did not explicitly adopt the "reasonable

foreseeability" language used as the guidelines. Based on the evidence supporting the enhancement, however, we conclude that Maldonado should have foreseen the possession of weapons. In United States v. Willis, 899 F.2d 873 (9th Cir. 1990), we upheld a sentence adjustment under § 1B1.3 in the absence of an explicit analysis of reasonable foreseeability by the district court. Id. at 875. First, we noted that there is a frequent relations between narcotics trafficking and the possession of firearms. Second we stated that where "co-conspirators are few in number and know each other well, the court may infer that each participant knew the others 'method of operation.'" Id.

The Willis rationale is applicable to the instant case. Although there were at least ten co-conspirators, Maldonado was closely involved with the leaser of the organization, J. Reyes, both in a managerial capacity and as his brother-in-law. Under these circumstances, this court should hold that it was not clearly erroneous for the district court to conclude that Maldonado knew of the possession and use of weapons by J. Reyes and the other co-conspirators.

Testimony at trial revealed that other members of the conspiracy had possession of firearms and used these firearms in drug-related activities. Moreover, Maldonado was closely involved with the leader of the organization, J. Reyes, both in a managerial capacity and as his brother-in-law. Under these circumstances, we conclude that the district court's finding that Maldonado knew of the possession and use of weapons by J. Reyes and the other co-conspirators was not clearly erroneous.

C. ENHANCEMENT FOR A MANAGERIAL ROLE IN THE OFFENSE

Maldonado argues that the district court erred by adding two points to his base offense level under U.S.S.G. § 3B1.1 (b) for

his role as a "manager or supervisor (but not an organizer or leader)" in the criminal activity for which he was convicted. A district court's finding that a defendant is a manager or supervisor of the criminal activity is a question of fact which is reviewed for clear error. Tamez, 941 F.2d at 777.

Maldonado's presentence report recommend a three-level sentence increase pursuant to U.S.S.G. § 3B1.1 (b), because the evidence at trial revealed that (1) he was an equal partner with J. Reyes in the operation of the drug conspiracy dating back to 1987. (2) he negotiated for the sale of cocaine and delivered cocaine to codefendants during drug transactions, and (3) he received a larger share of the drug proceeds and exercised more control of the drug distribution activities than the remainder of the codefendants. The district court adopted this recommendation because it concluded that Maldonado was "in a position of equality or near equality with Jose Reyes in the operation and the distribution in Pocatello, Idaho" based on the testimony at trial and from the videotapes showing Maldonado engaging in the sale of cocaine.

Maldonado argues that the district court's finding was incorrect because there was no evidence that he was involved in the conspiracy before he arrived in Idaho. The record does not support this contention. The district court specifically stated that its determination was based on "what transpired in Pocatello [Idaho]" and not on what may have happened prior to Maldonado's arrival in that state. The jury found that Maldonado's involvement with J. Reyes was more than merely a family relationship, but also involved a conspiracy to sell drugs and launder monies. The district court did not clearly err in finding that Maldonado played a managerial role in the offense.

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D. REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY

Maldonado contends that the district court erred in denying him a two-level reduction of his sentence for acceptance of responsibility. Maldonado argues that he was entitled to this reduction because he admitted wrongdoing both in a letter to the court that was appended to the presentence report and at the subsequent sentencing hearing. "Whether or not a defendant has accepted responsibility for his crime is a factual determination we review for clear error." United States v. Restrepo, 930 F.2d 705, 710 (9th Cir. 1991). "The district court's determination will not be disturbed 'unless it is without foundation.'" United States v. Rosales, 917 F.2d 1220, 1222 (9th Cir. 1991) (quoting U.S.S.G. § 3E1.1, comment. (n.5)).

Section § 3E1.1 of the Sentencing Guidelines permits a two-level reduction if the defendant "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." See also United States v. Aichele, 941 F.2d 761,767 (9th Cir. 1991) (quoting U.S.S.G. § 3E1.1). The record shows that Maldonado professed his innocence under oath at trial and offered innocent explanations of his conduct. The letter and statements offered by Maldonado in support of a sentence reduction do not clearly demonstrate that he recognized and accepted responsibility for his criminal activity. Maldonado did not admit that he was involved in the conspiracy to sell and distribute drugs in his letter to the court. The district court did not clearly err in finding that Maldonado's belated admission that he lied to the jury and district court about his involvement in criminal activity did not constitute a clear acceptance of responsibility.

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E. DISPARATE SENTENCING

Maldonado contends that the district court's enhancement of his sentence for weapons possession and for his managerial role in the drug operation violates his Fifth Amendment right to equal protection and due process, because the same enhancements were not levied against his codefendants Avila and A. Reyes. This contention is completely without merit.

We have repeatedly held that a defendant cannot base a challenge to his sentence solely on the lesser sentence given by the district court to his codefendants. United States v. Carpenter, 914 F.2d 1131, 1135-36 (9th Cir. 1990); United States v. Enrique Munoz, 906 F.2d 1356, 1359-60 (9th Cir. 1990). a defendant seeking to challenge his sentence must show that his sentence resulted from incorrect or inadmissible information, or from an incorrect application of the Sentencing Guidelines. Carpenter, 014 F.2d at 1136.

F. FEDERAL RULE OF CRIMINAL PROCEDURE 32 (c) (3) (D)

Maldonado contends that he is entitles to resentencing because the district court allegedly failed to comply with the procedural requirements of Federal Rule of Criminal Procedure 32 (c) (3) (d) which provides:

> If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

> A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

He argues that resentencing is required because the district court failed to append to the presentence report a written record of any findings or determinations which resolved his challenges. We disagree.

The record does not indicate whether the district court appended a transcribed copy of its oral findings to the presentence investigation report. In United States v. Roberson, 917 F.2d 1158 (9th Cir. 1990), we held that a district court's failure to append a transcribed copy of oral findings is "a ministerial error not requiring resentencing. The appropriate remedy is a limited remand to the district court with instructions that the court append a transcript of its proceedings to the presentence investigation report." Id. at 1159 (citation omitted); see also United States v. Fernandez-Angulo, 897 F. 2d 1514, 1516, (9th Cir. 1990) (failure to append findings to resolving controverted matters to the presentence report is ministerial error which does not require resentencing). Accordingly, we must "remand to allow the district court to comply with the technical requirements of rule 32 by ordering, if it has not already done so, that a copy of a transcript of its oral findings be appended to the presentence report." Roberson, 917 F. 2d at 1159.

The judgement of conviction as to each appellant is AFFIRMED. The sentence imposed on A. Reyes is AFFIRMED. As to Maldonado, the sentence is AFFIRMED but the matter is REMANDED so that the district court may append a transcript of its sentencing proceedings to the presentence investigation report.